In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 602

SILVIO AMOROSO, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 10-15) is not officially reported. The opinion of the Court of Appeals (R. 41-46) is reported at 193 F. 2d 583.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1952 (R. 46). The petition for a writ of certiorari was filed on February 21, 1952.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Tax Court's proceedings were invalid because, following the death of the judge who had presided at the hearings, another judge was assigned to render the decision.

2. Whether the court below correctly affirmed the Tax Court's finding that taxpayer's home and principal place of business were in the Greater Boston area so that taxpayer was not "away from home" within the meaning of Section 23(a) of the Internal Revenue Code while he was in that area.

STATUTES INVOLVED

The applicable statutes are printed in the Appendix, *infra*, pp. 9-11.

STATEMENT

The pertinent facts as found by the Tax Court are as follows (R. 10-13):

Taxpayer, a resident of Milton, Massachusetts, is a manufacturer's representative in the automotive industry. During 1945, taxpayer traveled throughout New England calling on his customers. About 20 per cent of his customers were in the Greater Boston area. The remaining 80 per cent were in other parts of New England. (R. 10-11.)

Although taxpayer had a telephone listing at 36 Cummington Street in Boston and made and re-

ceived telephone calls there, practically all of his office work was done at his home in Milton (R. 11).

The taxpayer kept a weekly record of various expenditures made by him on a printed form, called a "Salesmen's Expense Record". Most of the expenditures recorded thereon were not substantiated by receipts. (R. 12.) An examination of the amounts recorded by taxpayer for meals indicated that the $1,676.25 deduction claimed for this item included many expenditures made for meals during the days of each week which taxpayer spent in the Greater Boston area. Taxpayer's home and principal place of business were located in the Greater Boston area. Of the $1,676.25 deduction he claimed for meals, $1,224 was spent outside the Greater Boston area; the rest represented the cost of meals purchased while he was in that area. (R. 12-13.)

Upon the basis of these facts, the Tax Court held (R. 13):

> The amounts expended for meals in this area [Greater Boston area] are not traveling expenses incurred while away from home in the pursuit of a trade or business, deductible under the provisions of Section 23(a). They represent personal expenses within Section 24(a)(1), Internal Revenue Code, and are not deductible.

Affirming this ruling, the court below also rejected the contention that there had been a denial of due

process because, following the death of the judge who had heard the case, another judge had been assigned to render the decision of the Tax Court (R. 41-46).

ARGUMENT

1. There is no merit in taxpayer's claim that he was denied due process because the death of the judge who had presided at the hearing necessitated the assignment of another judge to formulate the decision of the Tax Court. It is clear that this procedure was well within the Tax Court's power and that taxpayer was in no way prejudiced by its employment.

The courts of appeals have repeatedly rejected the contention that a Tax Court decision is invalid because made by a judge other than the one who presided at the hearing. *Halle* v. *Commissioner*, 175 F. 2d 500, 504 (C. A. 2), certiorari denied, 338 U. S. 949; *Seaside Improvement Co.* v. *Commissioner*, 105 F. 2d 990, 992 (C. A. 2), certiorari denied, 308 U. S. 618; *Davidson* v. *Commissioner*, 91 F. 2d 516, 518 (C. A. 5); *Foss* v. *Commissioner*, 75 F. 2d 326, 329 (C. A. 1); cf. *Garden City Feeder Co.* v. *Commissioner*, 75 F. 2d 804 (C. A. 8); *Standard Oil Co.* v. *United States*, 7 F. Supp. 301 (C. Cls.), certiorari denied, 293 U. S. 599. These decisions are supported, not only by the plain dic-

tates of economy and necessity (as in this case, where the judge who heard the evidence died, or in others where the judge's term of office expired, before decision), but by the statutory authority with which Congress has endowed the Tax Court. Under Section 1103(c) of the Internal Revenue Code (Appendix, *infra,* p. 10), the presiding judge of the Tax Court is authorized to assign one or more judges to a division and to fill vacancies occurring in the division thereafter. Where a vacancy occurs after the hearing, the statutory grant of power to the presiding judge is plainly sufficient to permit his assignment of another judge to fill it.[1]

That the exercise of this power effected no prejudice in this case is clear from the record and from taxpayer's contentions on the merits before this Court. As the court below observed (R. 45-46), the taxpayer was the sole witness at the hearing, and the determination of which he complains involved no adverse finding as to his credibility. Thus, in the substantive ruling which he attacks, there was no rejection of his testimony that he lived in Milton, Massachusetts, and took meals in Boston while engaged in business, but only a holding that, since both of these places adjoin each other as parts of

[1] It is noteworthy in this connection that the statutory scheme under which the Tax Court operates provides expressly for decision by judges who did not preside at the hearing. The provision in Section 1118(b) (Appendix, *infra,* p. 11) for review by the whole Tax Court (sixteen judges) necessarily means that most of the judges who participate in cases so reviewed will not have seen and heard the witnesses.

the Greater Boston area, the cost of meals he ate in that area could not be deducted as expenses incurred "while away from home in the pursuit of a trade or business * * *."

2. The meaning of the statute[2] allowing deduction of

> traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business * * *

was considered in *Commissioner* v. *Flowers*, 326 U. S. 465, where this Court stated that three conditions must be met before a traveling expense may be deducted: The expense must be (1) a reasonable and necessary traveling expense, (2) incurred while away from home, and (3) incurred in the pursuit of business. The Court also concluded (326 U. S. at 470) that whether particular expenditures fulfill these three conditions is "purely a question of fact in most instances." Under the established rule of this Court, concurrent findings of two lower courts on such questions are final "in the absence of very exceptional showing of error." *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 605. No such showing is even suggested by the present petition.

Summarizing the undisputed facts, the court of appeals noted (R. 44-45) that the town of Milton,

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[2] Section 23(a), Internal Revenue Code (Appendix, *infra*, p. 9).

Massachusetts, is located ten miles from the city of Boston; that taxpayer's telephone exchange "Bluehills" is listed on the reverse side of his telephone bills as being within the "Central Offices of Boston and vicinity"; that the taxpayer "was near enough to his home so that he could return there from Boston without extensive travel." The court held (R. 44):

> We do not agree that the petitioner is "away from home" in the tax sense when he steps over the boundary of Milton. The finding of the Tax Court appears reasonable in the circumstances here.

The propriety of this holding is clear. Because of its factual nature, the problem of defining the boundaries of "home" cannot be resolved once for all cases. But it is apparent that designating a section of the metropolitan area of a large city as a "town" does not operate so to separate that section as to make the rest of the area "away from home" within the meaning of Section 23(a). As the court below stated, the very cases relied upon by taxpayer[3] "emphasize the idea that distance is an important factor in satisfying the 'while away from home' requirement" (R. 45), and that factor is not present in this case.

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[3] *Coburn* v. *Commissioner*, 138 F. 2d 763 (C.A. 2); *Flowers* v. *Commissioner*, 148 F. 2d 163 (C.A. 5), reversed, 326 U.S. 465; *Wallace* v. *Commissioner*, 144 F. 2d 407 (C.A. 9).

It can not be known by Court, tax collector, or taxpayer, which of the many cities and towns within the general area around the City of Boston are to be considered as being within and which are to be considered as being without that area. As a legal definition, the proposition below is fatally indefinite.

The petitioner therefore urges reversal of the decision below by an authoritative decision of this Court of the important question of basic revenue law involved in the second specification of error.

WHEREFORE, it is urged that the writ issue with respect to each specification of error.

Respectfully submitted,

SUMNER W. ELTON,

Attorney for Petitioner.

Whatever conflict may exist between cases defining "home" as "the equivalent of the taxpayer's place of business" and cases confining the term "to the taxpayer's actual residence" (see *Commissioner* v. *Flowers, supra,* at 471-472) is of no help to the taxpayer here. For the fully sustained finding of the courts below is that both the residence and place of business of this taxpayer are in the same—Greater Boston—area, and that he is not "away from home" while he is in that area. And so here, as in *Flowers* (see 326 U. S. at 472), there is no occasion to consider or resolve the conflict.

CONCLUSION

The decision of the court below is in all respects correct, turns on the particular facts of this case, and presents no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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MARCH, 1952.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—

(1) [As amended by Section 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

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SEC. 1103. ORGANIZATION [OF THE TAX COURT] [as amended by Section 504 of the Revenue Act of 1942, c. 619, 56 Stat. 957]

* * *

(b) *Designation of presiding judge.*—The Tax Court shall at least biennially designate a member to act as presiding judge.

(c) *Divisions.*—The presiding judge may from time to time divide the Tax Court into divisions of one or more members, assign the judges of the Tax Court thereto, and in case of a division of more than one judge, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a judge assigned thereto to serve thereon, is composed of less than the number of judges designated for the division, the presiding judge may assign other judges to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of judges thereto.

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SEC. 1117. REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made by a judge in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion

or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions and memorandum opinions.

* * *

SEC. 1118. PROVISIONS OF SPECIAL APPLICATION TO DIVISIONS.

(a) *Hearings, Determinations, and Reports.*—A division shall hear, and make a determination upon, any proceeding instituted before the Tax Court and any motion in connection therewith, assigned to such division by the presiding judge, and shall make a report of any such determination which constitutes its final disposition of the proceeding.

(b) *Effect of Action by a Division.*—The report of the division shall become the report of the Tax Court within 30 days after such report by the division, unless within such period the presiding judge has directed that such report shall be reviewed by the Tax Court. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Tax Court except in accordance with such rules as the Tax Court may prescribe. The report of a division shall not be a part of the record in any case in which the presiding judge directs that such report shall be reviewed by the Tax Court.

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